

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. 17-CV-00755 RB-KRS
12-CR-02903 RB

CHRISTOPHER ALBERT APALATEGUI,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Christopher Apalategui's Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody, filed on May 23, 2016¹ (Doc. 59), his Memorandum in Support, filed on August 18, 2017 (Doc. 67), and the Government's Response, filed on August 31, 2017 (Doc. 68).

Defendant pled guilty to being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2) (Docs. 36; Doc. 70-1 (Presentence Report (PSR)) at 1), and the Court sentenced him to the enhanced mandatory minimum sentence of 180 months' imprisonment pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B) (Docs. 40; 41).

The ACCA provides for a 15-year mandatory minimum sentence for defendants who have three prior qualifying convictions for violent felonies. The ACCA defines a violent felony as "any crime punishable by imprisonment for a term exceeding one year" that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another;

¹ Defendant filed his first motion pursuant to 28 U.S.C. § 2255 on October 22, 2014. (Doc. 44.) The Court denied the motion on May 29, 2015. (Doc. 56.) This is Defendant's second motion pursuant to § 2255. The Tenth Circuit granted Defendant authorization to file a second or successive § 2255 motion on July 14, 2017. (Doc. 60.) The motion is now fully briefed, and the parties agree that Mr. Apalategui's sentence should be adjusted in light of *Johnson*.

or (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .*” 18 U.S.C. § 924(e)(2)(B) (emphasis added). The italicized portion of this definition is known as the “residual clause.” In 2015, the Supreme Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that the residual clause is “unconstitutionally vague and may not be used to impose an increased sentence.” *Sarracino v. United States*, No. CV 16-374 MCA/CG, 2017 WL 3098262, at *2 (D.N.M. June 26, 2017) (citing *Johnson*, 135 S. Ct. at 2563).

Defendant’s three prior felony convictions included (1) a 1994 second-degree burglary conviction in Arizona; (2) a 1996 first-degree burglary conviction in Oregon; and (3) a 2000 aggravated robbery conviction in Arizona. (PSR ¶ 29.) Defendant now argues, and the Government agrees (*see* Docs. 67; 68 at 2), that at least one of Defendant’s three prior convictions—the 1996 first-degree burglary conviction—is not a “violent felony” in light of *Johnson*, “because Oregon first-degree burglary is broader than generic burglary and the statute is not divisible.”² (Doc. 68 at 4 (citation omitted).)

The United States Probation Office (USPO) prepared a Memorandum “to assist the Court in the adjustment of the defendant’s sentence” (Doc. 70 at 1.) In applying the reduction to Mr. Apalategui’s sentence, the USPO calculated the base offense level at 20, pursuant to U.S.S.G. § 2K2.1(a)(4)(A), as the defendant committed the offense after “sustaining one felony conviction for a crime of violence, in this case, Aggravated Robbery.” (*Id.*) Defendant received a three-level reduction for Acceptance of Responsibility for a total offense level of 17. (*Id.*) “A total offense level of 17 combined with a criminal history category of VI results in a guideline

² Defendant also argues that the 1994 second-degree burglary conviction is not a violent felony in light of *Johnson*. (Doc. 67 at 6–9.) Because the United States concedes that the first-degree burglary conviction “does not qualify as a violent felony in this case, the United States [did] not address Defendant’s argument that . . . [the] second-degree burglary is no longer a violent felony under the ACCA.” (Doc. 68 at 2.)

imprisonment range of 51 to 63 months.” (*Id.*) The Court acknowledges and will consider the United States’ request to re-sentence Mr. Apalategui at the statutory ten-year maximum due to his “lengthy and serious criminal history” (Doc. 68 at 5.)

THEREFORE,

IT IS ORDERED that Defendant’s Amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody, (Doc. 59) is **GRANTED**, and the Court will set this matter for re-sentencing.



ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE